**CHONG WOO YIT**

**v.**

**GOVERNMENT OF MALAYSIA**

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 106 OF 1988]
11 MARCH 1989

***REVENUE LAW:*** *Income Tax - Penalty for late payment - Claim for - Taxpayer failed to pay assessment pursuant to notice of assessment - Late payment increases imposed - Summary judgment - Certificate of Director General of Inland Revenue - Question of limitation to recover debt - Whether statute barred - Triable issues - Whether any defence to suit - Stay of execution pending hearing of appeal to Special Commissioners.*

The Department of Inland Revenue claimed the sum of RM114,749.03 being additional income tax for the years 1959 to 1968. After filing the writ against the appellant the respondent applied for summary judgment under O. 14 of Rules of the High Court 1980. The Senior Assistant Registrar, High Court, Malacca granted leave to enter summary judgment for the amount claimed. The taxpayer's appeal to the High Court, Malacca was dismissed. Hence this appeal.

**Held:**

**[1]** By virtue of the proviso to s. 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceedings by the Government for the recovery of any tax or interest thereon, although for the purposes of an assessment or additional assessment of tax under s. 91 of the Income Tax Act 1967, not made in any year of assessment or within twelve years after its expiration, the revenue would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment.

**[2]** On service of a notice of assessment on the person assessed, the tax payable under the assessment becomes due and payable whether or not the person appeals against the assessment and would be recovered by the Government by civil proceedings as a debt due to the Government.

**[3]** On such civil proceedings being brought by the Government, the Court, unlike the Special Commissioners of Income Tax, has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.

**[4]** As there are no triable issues is this case, the appeal was dismissed with costs. In the exercise of the Court's inherent jurisdiction, a stay of execution was ordered until determination by the Special Commissioners of the appellant's appeal against the assessments raised against him as the delay in hearing appeal since 1985 was not due to any fault on the part of the appellant.

*[Appeal dismissed with costs.]*

**Cases referred to:**

*Arumugam Pillai v. Govt. of Malaysia [1976] 2 MLJ 72*
*The King v. The Deputy Federal Commissioner of Taxation for South Australia, ex parte Hooper [1926] 37 CLR 368*
*ABC v. The Comptroller of Income Tax, Singapore [1959] 25 MLJ 162*
*Sun Mun Tobacco Company Ltd. v. Government of Malaysia [1973] 2 MLJ 163*
*Government of Malaysia v. Abdul Rahman [1975] 1 MLJ 276*

**Legislation referred to:**

Income Tax Act 1967, ss. 91, (3), (b), 103(1), (4), (5), (5A), 106, 142(1), 145(2)(c)
Limitation Act 1953, s. 33(1)
Rules of the High Court 1980, O. 14 r. 1(2)(b)

*For the appellant - Chong Kim Leong (Chong Kim Kong with him); M/s. Koh Kim Leng & Co.*
*For the respondent - Shaharuddin Ali, SFC*

**JUDGMENT**

**Gunn Chit Tuan SCJ:**

The Department of Inland Revenue claimed that Chong Woo Yit (the taxpayer) was justly and truly indebted to the Government of Malaysia in the sum of RM114,749.03 being additional income tax which was raised on him as follows:

| Date of Notices of Assessment. | Year of Assessment. | Amount of Tax. |
|---|---|---|
| 16 March 1985 | 1959 Additional | RM 20.04 |
| 16 March 1985 | 1961 Additional | RM15,301.60 |
| 16 March 1985 | 1963 Additional | RM 1,831.95 |
| 16 March 1985 | 1964 Additional | RM 4,538.70 |
| 16 March 1985 | 1965 Additional | RM 7,054.00 |
| 16 March 1985 | 1966 Additional | RM62,276.50 |
| 16 March 1985 | 1968 Additional | RM 8,329.75 |
| | Total | RM99,352.54 |

Notices of assessment for the said years of assessment were duly posted in March 1985 to the taxpayer's last known address and was deemed to have been served on him under s. 145(2)(c) of the Income Tax Act 1967.

As the taxpayer failed to pay the said sum of RM99,352.54 within 30 days after service of the notices of assessment, late payment increases were imposed in accordance with ss. 103(4), 103(5), and/or 103(5A) of the Income Tax 1967 as follows:

| Tax and penalty/ year of assessment amount | 1959 Additional | 1961 Additional | 1963 Additional | 1964 Additional | 1965 Additional | 1966 Additional | 1968 Additional |
|---|---|---|---|---|---|---|---|
| of Tax | RM20.04 | RM15,301.60 | RM1,831.95 | RM4,538.70 | RM7,054.00 | RM62,276.50 | RM8,329.75 |
| 10% penalty | - | RM 1,530.16 | RM 183.19 | RM 453.87 | RM 705.40 | RM 6,227.65 | RM 832.97 |
| 5% penalty | - | RM 841.58 | RM 100.75 | RM 249.62 | RM 387.97 | RM 3,425.20 | RM 458.13 |
| Total | RM20.04 | RM17,673.34 | RM2,115.89 | RM5.242.19 | RM8,147.37 | RM71,929.35 | RM9,620.85 |

The total sum claimed was therefore RM114,749.03 and under s. 103(1) of the said Act, tax was payable on the service of the notice of assessment whether or not that person appeals against the assessment.

It was averred in the statement of claim that under s. 106 of the said Act, any tax due and payable may be recovered by civil proceedings as a debt due to the Government. As the taxpayer had failed to pay the tax and penalty mentioned above, the Department of Inland Revenue filed a summons-in-chambers on 3 November 1986, to apply for leave to enter summary judgment against the taxpayer for RM112,035.79 being the balance of the amount in the writ of summons, together with interest at the rate of 8% per annum from the date of judgment to the date of payment and costs, less RM2,713.33 paid by the taxpayer in the intervening period.

The grounds for the said application were that under s. 142(1) of the Income Tax Act a certificate signed by the Director-General of Inland Revenue giving the name and address of the taxpayer and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the Court to give judgment for that amount in a suit under s. 106 of the said Act. Moreover, it was stated that there was no defence to the suit.

After hearing the said summons-in-chambers the learned Senior Assistant Registrar granted leave to enter summary judgment for the amount claimed by the Revenue, and the taxpayer appealed against that decision.

Before the learned Judge in the High Court it was contended by the defence that additional assessments made after a lapse of twelve years contravened s. 91 of the Income Tax Act and was statute barred. Secondly, it was argued that summary judgment under O. 14 r. 1(2)(b) of the Rules of the High Court 1980, was not available because the Revenue's claim was based on an allegation of fraud. Senior Federal Counsel for the Revenue contended that the additional sums were properly made in this case under s. 91(3) of the said Act, but before the learned Judge, he however refrained from specifying whether the Director-General had made the assessment because of fraud, wilful default or negligence. In support of his contention that limitation did not apply, Senior Federal Counsel cited the following passage from the Federal Court's judgment in *Arumugam Pillai v. Govt. of Malaysia* [1976] 2 MLJ 72 at p. 73:

> In our judgment, limitation as such does not apply to any proceedings by the Government for the recovery of any tax. This would seem clear from the proviso to s. 33(1) of the Limitation Ordinance 1953. Reading s. 91 of the Income Tax Act 1967 as a whole it would seem clear that, quite apart from any form of fraud, the words "within twelve years after its expiration" are irrelevant where there has been any wilful default on the part of a taxpayer in disclosing part of his income for any particular year of assessment.

We would agree that by virtue of the proviso to s. 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceedings by the Government for the recovery of any tax or interest thereon, although for the purposes of an assessment or additional assessment of tax under s. 91 of the Income Tax Act 1967, not made in any year of assessment or within twelve years after its expiration, the revenue would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment.

Before us Mr. Chong Kim Leong, one of the taxpayer's Counsel, referred to that part of the learned Judge's judgment in which he considered that the Revenue's claim was based on negligence under s. 91(3)(b) of the Income Tax Act and was not based on fraud. Counsel

contended that the learned Judge had erred in considering that an issue of negligence was involved. He also referred to the certificate of the Director-General under s. 142(1) of the said Act and stated that there was an error in it as it is stated therein that the amount of income tax still owing was RM112,035.70 whereas the further affidavit filed by one Lau Shee Khoon, a Special Grade Tax Assistant in the Department of Inland Revenue on 31 March 1987, stated that the amount then due and payable by the taxpayer to revenue was RM97,032.65. Counsel therefore contended that there were triable issues and that the Court had a discretion under O. 14 of the Rules of the High Court 1980 to grant the taxpayer unconditional leave to defend. Mr. Chong also told us that the taxpayer had appealed to the Special Commissioners of Income Tax in 1985 but until now no date of hearing had yet been fixed. He stated that he had applied to the learned Judge for a stay of proceedings until the matter has been disposed of by the Special Commissioners. The learned Judge in his judgment stated that Encik Shaharuddin, who appeared for the Revenue, initially opposed that application but subsequently retracted his objection, but nevertheless urged the Court not to exercise its powers in granting a stay. The learned Judge made no order on that application and suggested that should a hearing date by the Special Commissioners remain unfixed, the taxpayer could always initiate appropriate proceedings for an order of *mandamus*.

In reply to the contention of Counsel for the taxpayer, Encik Shaharuddin submitted that the law on the points raised by the taxpayer in the High Court and before us is clear. He stated that there was a distinction between an 'assessment' and a 'notice of assessment' as pointed out by Isaacs J in *The King v. The Deputy Federal Commissioner of Taxation for South Australia; ex parte Hooper* [1926] 37 CLR 368, 373:

> An assessment is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called 'a notice of assessment' ... But neither the paper sent nor the notification it gives is the 'assessment'. That is and remains the act or operation of the Commissioner.

Encik Shaharuddin pointed out that Buttrose J in *ABC v. The Comptroller of Income Tax, Singapore* [1959] 25 MLJ 162 had stated that the assessment itself is the administrative act of the Comptroller and determines the quantum of tax, whereas the notice of assessment imposes the liability to pay and sets the time running for objecting to the quantum of the assessment. A notice of assessment does not affect the amount payable. Senior Federal Counsel then conceded that the learned Judge was in error in stating that the revenue's claim was based on negligence. He stated that this was simply a claim by Government for payment of income tax and that it was clear from the decided cases referred to by Gill FJ (as he then was) in *Sun Mun Tobacco Company Ltd. v. Government of Malaysia* [1973] 2 MLJ 163, 165, that the effect of the relevant provisions of the Income Tax Act 1967 was that on the service of a notice of assessment on the person assessed, the tax payable under the assessment becomes due and payable whether or not the person appeals against the assessment, and could be recovered by the Government by civil proceedings as a debt due to the Government. On such civil proceedings being brought by the Government, the Court, unlike the Special Commissioners of Income Tax, has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.

The Senior Federal Counsel also referred us to the High Court case of *Government of Malaysia v. Abdul Rahman* [1975] 1 MLJ 276. In that case that taxpayer had been assessed to pay income tax and an additional income tax for certain years. On his failure to pay the amount claimed, the Government of Malaysia instituted a suit against him and applied for leave to enter final judgment. The Assistant Registrar gave leave to the Revenue and the taxpayer appealed. The appeal was dismissed on the grounds that the Court could not entertain any plea that the tax or additional tax was not correctly assessed and therefore leave to sign final judgment was confirmed. We would agree and approve the following *dictum* of Arulanandom J (as he then was) in that case when he said:

> When proceedings are commenced under O. 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when defence raised triable issues it is a rule of law that unconditional leave to defend should be given but under s. 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the Government under s. 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the Government the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) or (5). In this case the Director-General had exercised his powers under s. 91(1) of the Act and made additional assessments and added penalties which were provided for by the Act. Since the amount was not paid within thirty days further penalties were added and since that was not paid civil proceedings were brought to recover the tax as a debt due to the Government. Under s. 103(1) regarding payment of tax, the section reads:
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> 103(1) Subject to this section, tax payable under an assessment for a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.
>
> It is therefore quite clear that the Act does not contemplate any finality of assessment as it is clearly required in the Act that the moment the notice of assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not.

We were satisfied that in this case there are no triable issues and therefore dismissed the taxpayer's appeal with costs. However, as it was not due to any fault on the part of the taxpayer that his appeal to the Special Commissioners has still not been heard since 1985, in the exercise of our inherent jurisdiction we ordered a stay of execution until determination by the Special Commissioners of the taxpayer's appeal against the assessments raised against him. We also ordered that the deposit of RM500 be paid to the revenue to account of taxed costs.

Also found at [1989] 2 CLJ 87